Lewis S. Mudge Judicial Procedure
Mr. Speer

The Presbyterian Church in the United States of America

OFFICE OF THE GENERAL ASSEMBLY

MODERATOR
ROBERT E. SPEER, D.D.
NEW YORK, N. Y.

VICE-MODERATOR
WARREN H. LANDON, D.D., LL.D.
SAN ANSELMO, CAL.

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PHILADELPHIA, PA.

STATED CLERK
LEWIS S. MUDGE, D.D., LL.D.
PHILADELPHIA, PA.

TREASURER
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PHILADELPHIA, PA.

May 10, 1928.

Dr. Robert E. Speer,
156 Fifth Ave.,
New York City.

My dear Bobby:

Enclosed please find a copy of the memorandum re certain matters related to the presentation of Case No. 1 of the last General Assembly. This is the memorandum which you gave me before you sailed for Jerusalem a copy of which you asked me yesterday to forward for your files.

Yours sincerely,

L. S. M.

Lewis S. Mudge
Stated Clerk

The Presbyterian Church in the United States of America

OFFICE OF THE GENERAL ASSEMBLY

514 WITHERSPOON BUILDING

PHILADELPHIA, PA.

SOME IRREGULARITIES IN CONNECTION WITH THE REPORT OF THE JUDICIAL COMMISSION AND THE GENERAL ASSEMBLY OF 1927.

1. The Court itself was irregular. Commissioners came and went during the sitting of the Assembly as a Court in violation of the rules. The Moderator had made a statement with regard to this matter and orders had been given to the ushers to allow no one to enter or depart but many changes in the membership of the Court occurred. At one point a large number of Commissioners, as large as a whole Synod, found an opening in the curtains and came in during the session, and voted. The Moderator should have prevented all this but was helpless. He could not watch all these individuals.

2. Commissioners from interested Synods voted on more than one case, not in Judicial Case No. 1 alone. The Moderator should have prevented or disallowed this.

3. The minority dissenting opinion had not been presented to the Judicial Commission. On the other hand the member of the Commission who made it had assured the Commission that he would not present any minority report. His subsequent action was indefensible.

4. The minority dissenting opinion in its character and content was contrary to the rules. The member who presented it erred and the Moderator erred in admitting it but did not know its nature until it was read when it was too late for him to act.

5. Members of the Judicial Commission spoke on both sides of the issues in Case No. 1 as they came up, and contravened the rule forbidding discussion of the merits of the case, and the member who offered the minority opinion attempted to make motions with regard to the acceptance of his opinion and the course of procedure, though he was not a commissioner. When checked, he asked, altogether improperly, and in spite of the Moderator's remonstrances, that some commissioner should make the motions he indicated.

6. The platform was occupied, as is customary and appropriate by the officers of the General Assembly, and by the Judicial Commission alone, with one grave exception. A visitor who was not a commissioner or a member of any Assembly committee took a place on the platform immediately behind the Commission and volunteered comments and counsel in the proceedings.

7. As I said to the Assembly I think the errors made on both sides pretty evenly balanced and neutralized each other.

TELEPHONE WALNUT 8600 CABLE ADDRESS NILKNARF, PHILADELPHIA

UNITED

THE BENJAMIN FRANKLIN
CHESTNUT AT NINTH STREET
PHILADELPHIA

HORACE LELAND WIGGINS, Managing Director

Some Irregularities in Connection with the Report of the
Judicial Commission of the General Assembly
of 1927

1. The Court itself was irregular. Commissioners came and went during the sitting of the Assembly as a Court in violation of the rules. The Moderator had made a statement with regard to the matter and orders had been given to the stenos to allow no one to enter a depot but many changes in the membership of the Court occurred. At one point a large number of Commissioners, as large as a whole Synod, found an opening in the curtains and came in during the session, and voted. The Moderator should have prevented this but was helpless. She could not control all these individuals.
2. Commissioners from interested Synods voted on more than one case, not in Judicial Case No. 1 alone. ~~The Moderator knew in advance during this~~
3. The minority dissenting opinion has not been presented to the Judicial Commission. On the other hand the members of the Commission who

made it had assured the Commission that he would not present any minority report. The subsequent action was indefensible.

4. The minority dissenting opinion in its character and content was contrary to the rules ~~[illegible]~~. The member who presented it erred and the Moderator erred in admitting it but did not know its nature until it was read when it was too late for him to act.

5. Members of the Judicial Commission spoke on both sides of the issues in Case I as they came up, and contravened the rule forbidding discussion of the merits of the case, and the member who offered the minority opinion attempted to make motions with respect to the acceptance of his opinion and the course of procedure, though he was not a Commissioner. When checked, he asked, altogether improperly, (and in spite of the Moderator's remonstrance) that some Commissioner should make for him the motions he indicated.

6. The platform was occupied ~~alone~~, as is customary and appropriate, by the Officers of the General Assembly and by the Judicial Commission alone, with one grave exception. A visitor who was not a Commissioner or a member of any Assembly Committee, took a place on the platform immediately behind the Commission and volunteered comments and counsel in the proceedings.

As I said to the Assembly, I think the errors made on both sides pretty evenly balanced and neutralized each other.

Mr. Speer

February 2,1928

The Rev. Lewis S. Mudge, D.D.,
Witherspoon Building,
Philadelphia, Pa.

My dear Lew,

I enclose herewith a copy of a letter I have just written to Charley Erdman and also a copy of a letter from Judge Bruce. Do you think it would be well if you and Charley could have a talk with him and get all the light and help that we can? As I have said in writing to Charley, I think Judge Bruce is right in some of his criticisms, but I am not sure from the second and third paragraphs of his letter whether he has wholly grasped just what is proposed.

Ever affectionately yours,

RMS:C.

February 2,1928

The Rev. Charles R. Erdman,D.D.,
Princeton, N.J.

My dear Charley,

In view of Judge Bruce's service on the Judicial Commission and the suggestions which he sent to the General Council some months ago, I thought it would be only wise and right to consult him with regard to the proposals that are now before the General Council. I sent him, accordingly, a copy of the last draft of proposals, and enclose herewith a copy of his reply. Would it not be well if you and perhaps Dr. Mudge could find an opportunity to talk with Judge Bruce some time before our meeting in Philadelphia? I think there is force in some of his criticisms, but the fundamental question, of course, is as to whether the Judicial Commission should be made a court of final judgment?

If you can arrange such a conference with Judge Bruce, would it not be well if you would read over the suggestions which he sent us prior to our Chicago meeting?

Very affectionately yours,

RWS:C.
Enc. (Copy letter M. Linn Bruce, Jan. 31,1928)

M. LINN BRUCE
68 William Street
New York

January 31st, 1928.

The Moderator of
The General Assembly,
156 Fifth Avenue,
New York City.

My Dear Doctor Speer:-

I have your letter of the 24th inst. enclosing a Report on "Judicial Procedure" of a Committee of the General Council. Before attempting an expression of opinion which you request perhaps I ought, in fairness, to disclose my impression of the Report

The scheme seems to me wholly inadequate, fundamentally wrong and unworkable. It is an attempt to revamp the present Judicial Commission by correcting some of its demonstrated weaknesses - a sort of a temporary viaduct to carry part way over from the present unsatisfactory method to a scientific procedure.

When the Church speaks ex-cathedra it of course must speak by overture and when it ultimately interprets a dogma it should do so by the voice of the General Assembly. This power ought not to be delegated. All other controversies should be heard and finally determined by a Judicial Commission. This mental attitude gives bias to any opinion I may have. May I, therefore, comment on the Report paragraph by paragraph?

(Paragraph 1 p. 1)

If a nominee is voted for in all Presbyteries and must receive a majority of the votes cast in each Presbytery, will he have not only a "two-thirds of the whole number of Presbyteries" but also three-thirds?

(Paragraph 2 p. 1)

Fifteen members coming from fifteen Synods seem too many for concentrated work and unnecessarily expensive. The Supreme Court of the United States has nine members and the Court of Appeals of New York seven. Nine members will give more united effort than fifteen. This is to be a Court and not a legislative body.

(Paragraph 3 p. 1)

If the General Assembly sends down to the Presbyteries for election only the number of nominees necessary to fill the Commission, what choice have the Presbyteries?

(Paragraph 3 p. 2)

If the General Assembly "shall transmit" all "judicial business and cases" does this not include "any case administrative or judicial requiring judicial adjudication"?

(Paragraph 4 pp. 2, 3)

The Commission should not be required to meet at the time the General Assembly is in session as there may be no business to come before it. Moreover, it is not the proper time to hear, deliberate and determine judicial matters.

(Paragraph 1, p. 3)

There should be no appeal from a decision of the Commission except by leave of the Commission or of the General Assembly. The scheme proposed would keep some controversies going for three to five years. Of course, the Commission should have the powers, as all Courts have of granting a new trial or rehearing for good cause shown and provided the application is made within a time fixed. No confirmation by the General Assembly of a final decision of the Commission should be required.

If the scheme is right the procedure provided on pages 4, 5, 6, 7, seems proper.

These summary comments may be of no value and hence consign them to your waste basket. I return the Report herewith.

Cordially yours,

(Signed) M. Linn Bruce.

Mr. Speer

June 5,1928

The Rev. William Courtland Robinson,D.D.,
Delhi, N.Y.

My dear Cort,

Your two letters of February 27th and May 2nd were written me when I got back from the Jerusalem Missionary Council meeting and our Syria Mission Conferences on May 8th. I took your letters with me to the Assembly to read them on the train.

As you will have seen from the Blue Book the General Council was instructed by the General Assembly of 1927 to study the whole matter of Judicial Procedure and report to the Assembly of 1928. This it did and the General Assembly accepted its report and has sent the overture down to the Presbyteries. This will give opportunity for a thorough consideration of the whole question. I trust that you will read the report in the Blue Book which Dr. Matthews presented to the General Assembly and that you will write an article some time for the "Presbyterian" setting forth your grounds for the establishment of a real court. Could you not use the paper which you sent me in your letter of May 2nd in its entirety, simply modifying it so as to recognize the facts of the overtures that have been sent down. The presbyteries ought to study these overtures thoroughly and have the benefit of full criticism and comment, and I think it would be of great benefit if you would set forth your views in support of the fundamental principle that is involved either in one article of in a series of articles in the "Presbyterian."

Very cordially yours,

RES:C.

Wm C. Robinson

Mr. Speer

Ellicott City, Md.

May 7, 1928

Dr. R. E. Speer

New York

Dear Robert,

Enclosed is a paper, rather disreputable in appearance, for which you made request just prior to your departure over seas. I have been very ill, first time in thirty years, and cannot revise or have it rewritten.

I am deeply concerned about outcome at Tulsa. I know you and I do not see eye to eye at all, but my conviction is strong that you can prevent a re-organization of Princeton. My conviction is also strong that the Cause is not sufficient to have such an upheaval and further that if the Committee of Eleven are approved the Presbyterian Church U.S.A. will suffer a shock if not a split which it will take a generation to heal.

If I am able I hope to be in Princeton Monday.

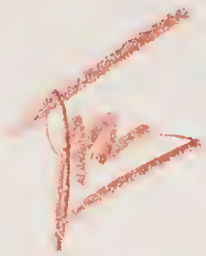
Cordially yours

WC Robinson

enc returned to Mr Robinson

W. Courtland Robinson

Mr. Speer



Delhi, N. Y.
June 7, 1928

Dr. Robert E. Speer
156 Fifth Ave.
New York City, N. Y.

My dear Robert:

Yours of Tuesday last is here. You honor me with your request that I write to further the proposed change in Judicial Procedure of our denomination. I have no copy of the article I sent to you. If you still have it perhaps you can return it to refresh my memory. I have not examined the proposed overture carefully but will do so. Ofcourse there will be no heated controversy, only seeking and sending light. I think I am done finally and forever with controversial writing.

If The Presbyterian will give me space I will try to aid.

Cordially yours,

W Courtland Robinson

WCR:MAL

W. Courtland Robinson

June 12, 1928

Rev. W. Courtland Robinson,
Delhi, New York

My dear Court:

I return herewith the article on our Judicial Procedure which you kindly sent me and which with very few changes I think would make a capital article or the bases of a series of articles in The Presbyterian.

I am glad you are willing to take the matter up because the Church ought to have all the light possible on this important question.

Very cordially yours,

RWS/B

W. A. Robinson

Mr. Speer

CABLE ADDRESS "HOPENNA"

Hotel Pennsylvania

CHESTNUT AND THIRTY-NINTH STS
NEAR WEST PHILA STA PENNSYLVANIA RR

Philadelphia

2/27/28

My dear Robert,

Your letter came several days since. I did write my ideas as to Judicial processes in our Church and sent a copy to Judge Bruce. The copy is in Delhi which we will not see until March 20th. I am quite convinced that the Judicial Commission or Commission of Appeal as Judge calls it, should decide independently of the Assembly.

I am glad you are interested in the matter. You and Judge can start a good movement. I presume, if you prevail, a suitable Committee will be appointed by the next Assembly to study the whole question.

Thanking you for writing

I am

Cordially Yours

W. C. Robinson

Mr. Speer

February 17,1928

The Rev. William Courtland Robinson,D.D.,
Delhi, N.Y.

My dear Cort,

Yesterday Lew Mudge and I had a very interesting luncheon with Judge Bruce to discuss with him the question that you and he and I talked over last summer in Delhi with regard to giving the Judicial Commission of the General Assembly final jurisdiction. You remember at that time the judge was rather adverse to this idea. I think now, however, that he would be willing to approve of it, provided it was understood, as of course it would have to be, that the Presbytery alone can determine the doctrine of the Church, that the General Assembly has a right from time to time to issue deliverances, and that the Judicial Commission would be strictly limited to passing upon appeals and complaints, etc.,properly referable to it, and that it would have power not to make law but only to interpret the law and constitution of the Church in its judicial judgments.

The whole matter is to come up before the General ~~Assembly~~ Council at its next meeting, and I imagine that it may come to the next General Assembly in definite form. I should be very grateful if you would write out for me some time your argument in behalf of lodging finality in the Judicial Commission. I remember what a strong statement you made and your quotation of your father's solid opinion.

I was at Princeton last Sunday speaking at the Seminary morning and afternoon and the First Church in the evening, and had a very good day.

Very cordially yours,

RMS:C.

Mr. Speer

M. LINN BRUCE
68 William Street
New York

January 31st, 1928.

The Moderator of
The General Assembly,
156 Fifth Avenue,
New York City.

My Dear Doctor Speer:-

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These summary comments may be of no value and hence consign them to your waste basket. I return the Report herewith.

Cordially yours,

(Signed) M. Linn Bruce.

Mr. Speer

January 24, 1928

The Honorable Linn Bruce,
68 William Street
New York City

My dear Judge Bruce:

At the last meeting of the General Assembly there was a very interesting discussion of the question of our judicial procedure. A committee consisting of Dr. Matthew, Dr. Swearingen, Dr. Erdman, Dr. MacIvor, and Mr. Reid, brought in a report which in the end seemed to meet with the approval of the entire council. The Committee was to reconsider the matter and report again a further draft at the meeting of the General Council in February.

I enclose herewith confidentially a copy of the report as it was presented and revised at the last meeting. I wish very much that you could find time to read it over and return it with your judgment.

The provision for the election of the Commission by two-thirds of the Presbyteries was suggested in view of the fact that the Commission would now become the final court determining doctrinal issues and that the Church at large might be willing to commit to it such responsibility if the Court was elected by the same number of Presbyteries which must approve any change in the doctrinal statements of the Church. It was hoped that the Church would be willing to trust the Court so elected with the interpretation and application of these doctrinal standards.

Perhaps there is an open question in the minds of some as to whether if a third judgement is to be presented by the permanent judicial commission this judgement should not be subject to review by the Assembly if it does not adopt it. Will you kindly return the enclosed paper with the expression of your own opinion.

With sincere regard,

Very faithfully yours,

RWS/B

Enclosed Paper entitled "The Permanent Judicial Commission."

COPY

Professor Frederick N. Willson,
Princeton, N.J.

June 6, 1928

My dear Professor Willson,

Your kind letter of May 16th was received just before I had to leave for the General Assembly and there was no time to acknowledge or answer it at that time. I prize so much however your friendship and confidence that I must take the liberty now of commenting very plainly and as clearly as possible on the letter from the "Presbyterian" of May 10th, which you sent me. The Commissioner who wrote that letter is lamentably ignorant of the Constitution and the law of our Church. I will try to set the matter forth accurately:

1. The case referred to was Judicial Case No. 1 before the General Assembly of 1927. On this case the Permanent Judicial Commission brought in its judgment before the General Assembly. You will find this on page 198-199 of the General Assembly's Minutes of 1927. I wish you would read this judgment. Immediately upon the presentation of the Judicial Commission's preliminary judgment any member or members of the Commission have the right to present a minority opinion. This Dr. Eagleson did. It was at this point I think that the first error of procedure entered. The Judicial Commission came into the Assembly supposing that it was to present only one judgment. Dr. Eagleson, who had dissented from this judgment, had informed the Commission that he would not present a minority opinion to the Assembly. Just as the Commission was about to enter the Assembly he informed it that he had changed his mind, and had an opinion to present. It was a question whether the Commission should consent or should ask the Assembly to postpone receiving its report until the Commission could hear the minority opinion. The Assembly was waiting for it and the Commission decided to go on and to allow Dr. Eagleson to present his opinion to the Assembly without its first having been heard by the Commission. The Chairman of the Commission was much disturbed as he took his place on the platform but he said he thought it was best in courtesy not to make any demur. I think myself that it was not proper for Dr. Eagleson after having informed the Commission that he would not present a minority opinion to change his purpose and present one when it was too late for the Commission to hear it. I think it was a mistake for the Commission to allow the opinion to be presented without first having me to consider it, and I think I was in error in allowing it under these circumstances. However, I had no technical constitutional ground on which to object. I could only have objected on grounds of broad Christian courtesy and morality, and while I think these are adequate grounds they might not have seemed so to others. I was silent, accordingly, and allowed the minority opinion to be read.

2. I think the second error was in the content of the minority opinion, which was directly at variance with our Constitution in that it introduced matters which were not contained in the record of the case. Our Constitution specifically declares "nothing which is not contained in the record shall be taken into consideration in the higher judicatories." Furthermore the minority opinion asked the Assembly to adopt courses of action directly at variance with the Constitution and with the principles of the Constitution as clearly set forth and unanimously approved by the General Assembly of 1927 itself in the Report of the Commission of Fifteen.

3. Immediately upon the reading of the judgment of the Commission and the minority report I did what our Constitution explicitly requires, namely, put the

following question to the Assembly: "Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?" This question has to be put without debate. When it was put a majority voted in the negative. This did not make the minority report the question before the Assembly, and no vote was taken on the minority report. The writer to the "Presbyterian" shows how easy it is for a man to believe what is wholly untrue when he says that Dr. Eagleson's report "was overwhelmingly adopted by the Assembly." After the Constitutional question which I put regarding the preliminary judgment the law of our Church allows only one form of immediately following question and requires that it shall be also put as follows: "Shall the General Assembly now proceed to review the preliminary judgment of the Permanent Judicial Commission?" Accordingly I put this question. This question is debateable except on the merits of the case. There was some debate, to which I shall refer, and then the question was put and again the majority voted in the negative. That closed the matter. The General Assembly had voted not to accept the preliminary judgment of the Permanent Judicial Commission, but it had also voted not to review that judgment. The effect of such actions is perfectly simple, the Constitution itself providing "if the case be not reviewed by the General Assembly to which it has been reported then at the dissolving of the same the preliminary judgment of the Permanent Judicial Commission shall be held to be the final judgment of the General Assembly." I read this rule to the Assembly at the time and pointed out clearly what the effect of its action was, but the Court rose without any further action. The constitutional procedure in the case was clear and was followed absolutely according to our Book of Government.

4. In the debate on the question of review further irregularities entered. Dr. Eagleson, who was a member of the Judicial Commission but not a member of the Assembly undertook to speak going into the merits of the case which the law forbade and even attempted to make motions, and when I stopped him from doing this, over my protest he called out asking some member of the Assembly to make the motions for him. This was wholly irregular. Then some member of the Assembly asked whether the view of the Commission itself might not be expressed inasmuch as Dr. Eagleson had argued for the minority opinion. I asked the Assembly whether there was any objection on the part of any one to hearing from the Commission and when there was none Judge Bruce spoke of the purely constitutional aspects of the question and Dr. Harkness did the same. There is difference of opinion as to whether a Judicial Commission is a General Assembly Committee or not. If it is a committee, as some hold, then, its Chairman and other member would have a right to speak; if it is not such a Committee, and I am inclined to take this view, then, its members ought not to speak. What irregularities there were, however, on this matter were on both sides and no member of the majority of the Judicial Commission attempted to do what Dr. Eagleson did, in making motions.

5. In voting on the question of review, it has been declared that members voted who had no right to do so, particularly some from the Synod of New York. I think I should have tried to prevent this, although our Constitution in 1927 lays the duty of refraining from voting, when they are not entitled to do so, upon the honor of the commissioners and does not make it the duty of the Moderator. I think, however, that the Moderator ought to assume that duty. I did not do so in* this case because I had not done so in the preceding cases for, in truth, it was not in my mind at all, and because, further, I could not have done so if I had tried. Our law requires not only that members of interested judicatories may not vote but also that no one may vote who has not been present at the case from the beginning. It requires also that members may not come and go during the sitting of the Court. In San Francisco we met in an enormous hall whose entrances could not be guarded. Dr. Mudge had given the ushers specific instructions not to admit anyone after the opening of the Court and as it convened I warned members not to leave. In spite of these warnings dozens of commissioners

* in SanF

found their way in through openings in the curtains and at least one commissioner from one of the most conservative presbyteries who voted came in in the very middle of the proceedings. The commissioners were not sitting by districts and there was no way of controlling them. My own judgment would be that what ver errors may have been committed on one side were quite fully counterbalanced by similar errors on the other.

When the Assembly adjourned that day, I was deeply distressed over the proceedings and consulted at once with some of the most trustworthy men on both sides. They were agreed that the errors just about counterbalanced one another, that it had not been possible to prevent them, and that there was no way of undoing their effects. Accordingly the next morning I stated the whole matter fully to the Assembly with the result that the Assembly voted without dissent to approve the minutes of the previous day's proceedings and, then, later it voted to approve the minutes which contained this approval. As a result the whole case was finally and constitutionally settled.

The petition addressed to this General Assembly to re-open the case and many of the articles which have appeared in the "Presbyterian" have rested on misapprehensions or misstatements of facts, or on ignorance of the law of the Church. The whole matter was brought before the recent Assembly and the petition which had been largely signed was referred to the Committee of Bills and Overtures, and by that Committee the purely constitutional questions involved were referred to the Committee on Polity. The Committee on Polity brought in a report to the Assembly proving, as it seems to me incontestably from our Law and precedents, that the case was definitely and constitutionally settled by the Assembly of 1927, and the Assembly of 1928 overwhelmingly approved this view.

The doctrine of the Virgin Birth does not appear in the record of this case as it came to the General Assembly. If that doctrine were involved, then, there should have been such action in the lower judicatory as would have brought it into the record. On the record the question was clear and the General Assembly clearly decided it. As you know, I believe unequivocally in the fact of the Virgin Birth of Our Lord and in the fact of His bodily Resurrection and in His miracles. I believe that He is more and greater than any of the creeds represent Him, but I do not believe that we promote the acceptance of these beliefs by our litigious processes and, certainly, not by trampling on our constitution. We cannot hope to do good by doing wrong.

All this is just a personal explanation for you. This case is settled. The records of the General Assembly in the matter are authentic and accurate, and the decisions that were reached were constitutional and just. We should let these matters alone now and go on in right and wise ways to proclaim the great Christian facts and to prove them convincingly and persuasively to the minds and hearts of men.

With warm regard,

Your sincere friend,

R.A.:C

June 6th, 1928

Professor [illegible] Willson,
Princeton, N.J.

My dear Professor Willson,

Your kind letter of May 14th was received just before I had to leave for the General Assembly and there was no time to acknowledge or answer it at that time. I prize so much however your friendship and confidence that I must take the liberty now of commenting very plainly and as clearly as possible on the letter from the "Presbyterian" of May 1[illegible]th, which you sent me. The Commissioner who wrote that letter is lamentably ignorant of the Constitution and the law of the Church. I will try to set the matter forth accurately:

1. The case referred to was Judicial Case No.1 before the General Assembly of 1927. In this case the Permanent Judicial Commission brought in its judgment before the General Assembly. You will find this on page 198-19[illegible] of the General Assembly's Minutes of 1927. I wish you would read this judgment. Immediately upon the presentation of the Judicial Commission's preliminary judgment any member or members of the Commission have the right to present a minority opinion. This Dr. [illegible]leson did. It was at this point I think that the first error of [illegible] [illegible]. The Judicial Commission came in to the Assembly reporting that it was to present only one judgment. Dr. [illegible]leson, who had dissented from this judgment, had informed the Commission that he would not present a minority opinion to the Assembly. Just as the Commission was about to enter the Assembly he informed it that he had changed his mind, and had an opinion to present. It was a question whether the Commission should consent or should ask the Assembly to postpone receiving its Report until the Commission could hear the minority opinion. The Assembly was waiting for it and the Commission decided to go on and to allow Dr. [illegible]leson to present his opinion to the Assembly without its first having been heard by the Commission. The Chairman of the Commission was much disturbed at [illegible] [illegible] his place on the platform but he said he thought it was best in order not to make any demur. I think myself that it was not proper for Dr. [illegible]leson after having informed the Commission that he would not present a minority opinion to change his purpose and present one when it was too late for the Commission to hear it. I think it was a mistake for the Commission to allow the opinion to be presented without first having met to consider it, and I think I was in error in allowing it under these circumstances. However, I had no technical constitutional ground on which to object. I could only have objected on grounds of [illegible] Christian courtesy and morality, and [illegible]

I think there are reasonable grounds they might not have wanted so to [illegible]. I was silent, accordingly, and allowed the minority opinion [illegible].

2. I think the second error was in the content of the minority opinion, which was directly at variance with our Constitution in that it introduced matters which were not contained in the record of the case. Our Constitution specifically declares "nothing which is not contained in the record shall be taken into consideration in the higher judicatories." Furthermore the minority opinion asked the Assembly to adopt courses of action directly at variance with the Constitution and with the principles of the Constitution as clearly set forth and unanimously approved by the General Assembly of 1927 itself in the Report of the Commission of Fifteen.

3. Immediately upon the reading of the judgment of the Commission and the minority report I did what our Constitution explicitly requires, namely, put the following question to the Assembly: "Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?" This question has to be put without debate. When it was put a majority voted in the negative. This did not make the minority report the question before the Assembly, and no vote was taken on the minority report. The writer to the "Presbyterian" shows how easy it is for a man to believe what is wholly untrue when he says that Dr. [illegible]'s report "was overwhelmingly adopted by the Assembly." After the Constitutional question which I put regarding the preliminary judgment the law of our Church allows only one form of immediately following question and requires that it shall be also put as follows: "Shall the General Assembly now proceed to review the preliminary judgment of the Permanent Judicial Commission?" Accordingly I put this question. This question is debatable except on the merits of the case. There was some debate, to which I shall refer, and then the question was put and again the majority voted in the negative. That closed the matter. The General Assembly had voted not to accept the preliminary judgment of the Permanent Judicial Commission, but it had also voted not to review that judgment. The effect of such actions is perfectly simple, the Constitution itself providing "if the case be not reviewed by the General Assembly to which it has been reported then at the dissolving of the same the preliminary judgment of the Permanent Judicial Commission shall be held to be the final judgment of the General Assembly." I read this rule to the Assembly at the time and pointed out clearly what the effect of its action was, and the Court rose without any further action. The constitutional procedure in the case was clear and was followed absolutely according to our Book of Government.

4. In the debate on the question of review further irregularities occurred. Dr. [illegible], who was a member of the Judicial Commission

but not a member of the Assembly undertook to speak going into the merits of the case which the law forbade and even attempted to make motions, and after I stopped him from doing this, over my protest he called out asking some member of the Assembly to make the motions for him. This was wholly irregular. When some member of the Assembly asked whether the view of the Commission itself might not be expressed inasmuch as Mr. Eagleson had argued for the minority opinion, I asked the Assembly whether there was any objection on the part of any one to hearing from the Commission and when there was none Judge Bruce spoke of the purely constitutional aspects of the question and Mr. Darkness did the same. There is difference of opinion as to whether a Judicial Commission is a General Assembly Committee or not. If it is a committee, as some hold, then, its Chairman and other members would have a right to speak; if it is not such a committee, and I am inclined to take this view, then, its members ought not to speak. What irregularities there were, however, on this matter were on both sides and no member of the majority of the Judicial Commission attempted to do what Mr. Eagleson did, in making motions.

5. In voting on the question of review, it has been declared that members voted who had no right to do so, particularly some from the Synod of New York. I think I should have tried to prevent this, although our Constitution (in 1927) lays the duty of refraining from voting, where they are not entitled to do so, upon the honor of the commissioners and does not make it the duty of the Moderator. I think, however, that the Moderator ought to assume that duty. I did not do so in ~~California~~ San Francisco in this case because I had not done so in the preceding cases for, in truth, it was not in my mind at all, and because, further, I could not have done so if I had tried. Our law requires not only that members of interested judicatories may not vote but also that no one may vote who was not present at the case from the beginning. It requires also that members may not come and go during the sitting of the Court. In San Francisco we met in an enormous hall whose entrances could not be guarded. Dr. Sludge had given the ushers specific instructions not to admit anyone after the opening of the Court and as it convened I warned members not to leave. In spite of these warnings dozens of commissioners found their way in through openings in the curtains and at least one commissioner from one of the most conservative presbyteries who voted came in in the very middle of the proceedings. The commissioners were not sitting by districts and there was no way of controlling them. My own judgment would be that whatever errors may have been committed on one side were quite fully counterbalanced by similar errors on the other.

When the Assembly adjourned that day, I was deeply distressed over the proceedings and consulted at once with some of the most trustworthy men on both sides. They were agreed that the errors just about counterbalanced one another, that it had not been possible to prevent them, and that there was no way of undoing their effects. Accordingly the next morning I stated the whole matter fully to the Assembly with the result that the

Assembly voted without dissent to approve the minutes of the previous day's proceedings and, then, later it voted to approve the minutes which contained this approval. As a result the whole case was finally and constitutionally settled.

The petition addressed to this General Assembly to re-open the case and many of the articles which have appeared in the "Presbyterian" have rested on misapprehensions or misstatements of facts, or on ignorance of the law of the Church. The whole matter was brought before the recent Assembly and the petition which had been largely signed was referred to the Committee of Bills and Overtures, and by that Committee the purely constitutional questions involved were referred to the Committee on Polity. The Committee on Polity brought in a report to the Assembly proving, as it seems to me incontestably from our law and precedents, that the case was definitely and constitutionally settled by the Assembly of 1927, and the Assembly of 1926 overwhelmingly approved this view.

The doctrine of the Virgin Birth does not appear in the record of this case as it came to the General Assembly. If that doctrine were involved, then, there should have been such action in the lower judicatory as would have brought it into the record. On the record the question was clear and the General Assembly clearly decided it. As you know, I believe unequivocally in the fact of the Virgin Birth of our Lord and in the fact of His bodily Resurrection and in His miracles. I believe that He is more and greater than any of the creeds represent Him, but I do not believe that we promote the acceptance of these beliefs by our litigious processes and, certainly, not by trampling on our Constitution. We cannot hope to do good by doing wrong.

All this is just a personal explanation for you. This case is settled. The records of the General Assembly in the matter are authentic and accurate, and the decisions that were reached were constitutional and just. We should let these matters alone now and go on in right and wise ways to proclaim the great Christian facts and to prove them convincingly and persuasively to the minds and hearts of men.

With warm regard,

Your sincere friend,

[illegible]

Mr. Speer

156 Fifth Avenue, New York City

July 18th, 1927

Dr. Mark A. Matthews,
Dr. Henry C. Swearingen,
Dr. Charles R. Erdmann,
Dr. J. ~~W.~~ McIvor,
Mr. A. A. Reed

Dear Friends,

As you know you constitute the Committee to which the General Council has referred for report at its November meeting the questions committed to the Council at the last General Assembly as to the desirability of any changes in the procedure of the Assembly in the matter of judicial cases. The experience of the last Assembly brought to light some of the difficulties which members of the General Council had already foreseen, and other difficulties which had not been foreseen but which were clearly revealed by the tests to which our present rules were put in connection with the consideration of the Report of the Judicial Commission.

For the sake of convenience, it may be well to recall the precise language of the present rules.

"132. Immediately upon the presentation of the preliminary judgment in a case, any member or members of the Commission shall have the right to read and file a dissenting opinion or opinions.

"133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the Moderator of the General Assembly shall put the question, without debate, 'Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?'

If a majority shall vote in the affirmative, the preliminary judgment of the Permanent Judicial Commission shall be declared by the Moderator to be the final judgment of the General Assembly.

If a majority shall vote in the negative, a motion, debatable except on the merits of the case, will be in order to review the preliminary judgment of the Permanent Judicial Commission.

"134. The preliminary judgment in any case when reviewed by the General Assembly to which it has been reported, may be affirmed, reversed, modified, suspended, or remitted for further hearing. In this review, instead of the record in the case, the finding of the facts by the Judicial Commission shall be read. On such review, if the case be not remitted, the decision of the General Assembly shall be held to be its final judgment. If the case be not reviewed by the General Assembly to which it has been reported, or if it be reviewed and no decision be reached, then at the dissolving of the same the preliminary judgment of the Permanent Judicial Commission shall be held to be the final judgment of the General Assembly."

This procedure is clear and simple if there is no dissenting opinion and if the General Assembly accepts the preliminary judgment. But, if there is a dissenting opinion or the Assembly does not accept the preliminary judgment, or if both these contingencies occur, then, questions of increasing perplexity arise.

1. The rules contain no qualifications whatever with regard to the minority opinion. (a) They do not require that it should be read to the Commission or even that the Commission should be notified that it is to be presented. At the last Assembly the Chairman of the Commission stated that the Commission had concluded its business and adjourned to report to the Assembly with the understanding that no dissenting opinion would be presented and it did not know of such opinion until it was just about to come on the platform and the Moderator had announced the appearance of the Commission. (b) Nothing is said as to the nature or limits of such an opinion. It may happen, and usually does happen, in the case of minority opinions, that they do not confine themselves to the scope of the majority opinion and that they introduce personal argument, as it is almost inevitable that they should in order to justify the dissent. It may even happen that such opinions are inappropriate in their form or content but if unread to the Commission there is no chance to point this out. The Moderator has no knowledge in advance and would be in a difficult position if he should interrupt such an opinion or question its propriety.

2. If the Assembly declines to accept the preliminary judgment the only motion then allowable is the motion to review the preliminary judgment. The dissenting opinion does not become the motion before the Assembly as some have erroneously supposed. After the motion to review has been carried, then, it is possible for the Assembly either to confirm, reverse, modify, suspend or remit the preliminary judgment. I suppose it would be possible for it, if it desired, to substitute the dissenting opinion for the preliminary judgment, but this could not be done until after the motion to review the preliminary judgment had carried. The present rules state that the motion to review is "debatable except on the merits of the case". The experience of the last Assembly seemed to indicate that this limitation was impossible of enforcement. Both sides in debating the motion went into the merits of the case. How can the Moderator enforce this provision? He does not know in advance what is to be said; when it has once been said it cannot be unsaid and any objection to it by the Moderator will be unacceptable to the part of the Assembly whose view it represents.

When the Assembly has voted to review the preliminary judgment and in proceeding to review it the present rules state "that in this review instead of the record in the case the finding of the facts by the Judicial Commission shall be read.

(a) How is the record of the case to be excluded and only the Judicial Commission's finding of the facts to be permitted to come before the Assembly? (b) Does the right of any member or members of the Commission to read and file a dissenting opinion involve also their right to present a dissenting finding of the facts?

3. Have members of the Judicial Commission any right to speak? At the last Assembly the members who presented the priliminary judgment and the dissenting opinion both claimed the right to speak. The presenter of the dissenting opinion attempted to make motions and when this was objected to he asked some members of the Assembly to make the motion for him. No one knew that he was expecting to do this and once it was done it could not be undone. If it is improper for members of the Judicial Commission to speak, then, ought it to be provided that they shall not be Commissioners at the same time that they are members of the Commission? As Commissioners it would be difficult to deny their right to speak in any discussion of the motion to review or in any subsequent motion.

4. Is there need of clarifying the application of the rule that members of judicatories who are parties to an appeal may not deliberate or vote? Some of our lawyers contend that this rule would not apply to Commissioners from presbyteries of a delegated Synod who were not actually members of the Synod meeting whose actions are the subject of appeal or protest.

5. If errors had been committed in the consideration of a judicial Commission report and the Assembly desired on the following day to reconvene as a court and reconsider the matter, how could this be done? If provision is to be made for this, ought not the Judicial Commission to be requred to remain at the Assembly until the end? Even if it does, however, can the Assembly itself be so accurately reconstituted on the following day as to involve the same personnel?

6. This question suggests the gravest question of all, namely, as to whether the General Assembly is or ever can be made a genuine court? It may, of course, verbally be called a court, but can it ever possess the judicial temper and meet the intellectual and moral and spiritual requirements of a court? By nature and constitution the General Assembly is a convention or assembly, and the problem which is in the minds of many is as to whether any change whatever in rules of procedure can reach the real root of our problems? It is said that our Government and our Church are built on the same model, but in this particular they are fundamentally and radically different. The Supreme Court and the Congress of the United States are not the same body and never could be. No legislation or mere rule of constitutional procedure could ever turn Congress into a court. Again and again our Assembly, although constituted as a court has been disqualified in acting as such. People who are not members of the Assembly have sat in it and have made suggestions to its members. The Book of Discipline provides that "no member of a judicatory who has not been present during the whole of a trial shall be allowed to vote on any question arising therein except by unanimous assent of the judicatory and of the party." It has been justly criticized that some interested parties voted in the last General Assembly. That was true of more than one case and of representatives of more than one body. A number of commissioners came in during the Report of the Commission and voted. The ushers had been instructed to guard the entrance but at one important point a large group of Commissioners, 20 or 30 or more, found an unguarded entrance between the curtains and came in and participated.

Of course, it can be left to the honor of the Commissioners to observe the rules but in the excitement of issues they are pretty sure to forget and no Moderator will be able impartially and absolutely without exception to enforce them.

I think these are the important issues which observation of the procedure at the last Assembly suggest. The question which arises is as to whether the problem can be best cared for on the whole by amendments as to the present rules or whether the attempt should be made, as suggested by Dr. Matthews and Dr. Swearingen, I believe, to establish a real court.

I have received three illuminating suggestions with regard to amendments in the present rules of procedure.

The first is from Mr. Reed, who suggests the following substitute for Section 133, which I have quoted at the beginning of this letter:

> "133. The procedure in connection with the presentation to the General Assembly of the priliminary judgment of the Permanent Judicial Commission and of a dissenting opinion or opinions, if any, shall be as follows:
>
> Upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the following motion shall be in order and the Moderator of the General Assembly shall assume and shall clearly state that such motion has been duly offered and seconded; that is to say, "That the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly."
>
> It will be permissable at this point in the procedure, for any member of the Court (any enrolled commissioner to the General Assembly) to offer the following written motion (for a substitute); to wit, 'That the preliminary judgment of the Permanent Judicial Commission be reviewed,' accompanied by a brief and concise written statement, without argument, of the salient reasons for the motion.
>
> Thereupon, without debate, the question shall be put to the Assembly and the vote taken."

The second is from Dr. McCartney, whose loss on the General Council we must all lament as his ex officio term expired at the last Assembly and there was no vacancy to which he could be appointed on the Council.

> "1. The term of service for a member of the Judicial Commission ought to be five years.
>
> 2. It must be made plain to the Chairman that this Commission is in reality only a Committee, reporting to the Assembly, and not a Commission from whose judgment there is no appeal, as in the case of presbyteries and Synods.
>
> 3. The right of members of the General Assembly not only to support a dissenting judgment, if read, or another motion to review from the floor, should be carefully guarded.
>
> 4. The law should clearly provide that no member of the Judicial Commission, after the judgments have been read, should argue the case, or plead for the judgments; as did Judge Bruce at the last General Assembly.

5. Members of Judicatories complained against, should not have a vote in the Assembly, when the case of such Judicatory is up for consideration."

The third is from Dr. Mudge, who suggests the following substitute for Sections 132 and 133:

Section 132. Immediately upon the presentation of the preliminary judgment in a case, any three members of the Commission shall have the right to read and file a dissenting opinion, provided said opinion has been read in full and filed at a sitting of the Permanent Judicial Commission, held at least twenty-four hours prior to said presentation. If there be a dissenting opinion, the majority of the Commission may read and file a rejoinder immediately following the presentation to the General Assembly of said dissenting opinion.

Section 133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any , and of a rejoiner or rejoiners therein, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, and the rejoiner or rejoiners thereto, if any, the Moderator of the General Assembly shall put the question, without debate, 'Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?'

If a majority shall vote in the negative, then the finding of the facts by the Permanent Judicial Commission shall be read and a action debatable, except as to said facts, will be in order to review the preliminary judgment of the Permanent Judicial Commission."

I have raised with Dr. Macartney the question as to whether the conception of the Judicial Commission as only a Committee of the Assembly may not raise added difficulties. (a) Would it not tend to make our procedure even less judicial than it now is and to make the Assembly itself the court to hear the whole case? (b) Would this conception not tend to encourage the election of the members of the Judicial Commission as regular Commissioners as is done now in the case of important Committees, in order that the members of these Committees might have the full rights of Commissioners in debate? (c) Would it not especially accomplish the very thing which Dr. Macartney would guard against in his fourth suggestion, inasmuch as if the Commission is only a Committee its Chairman would have the right under our rules to argue for the Commission's report and to participate in the debate? (d) If the Commission is only a Committee, then, a motion to substitute the minority report for the majority report is at once allowable contrary to the provision of Section 133 with regard to the Report of the Judicial Commission. (e) Will it be possible for any Moderator to enforce in a free General Assembly discussion the limitation specified in Section 133 in the phrase "debatable except on the merits of the case.", and, in Section 134, the exclusion from the Assembly's review of the record of the case and the admission only of "the finding of the facts by the Judicial Commission."

It may be that the Church would not be satisfied to transfer from the

General Assembly to a permanent court, meeting at some other time in the year, the right of final decision. One asks, however, whether the attempt to decide judicial questions in a general convention like the Assembly can ever be anything but unsatisfactory? Perhaps safeguards can be discovered however which will retain our present scheme of popular government in this matter and escape, at least, its gravest difficulties. Or, on the other hand, it may be possible to frame provision for a permanent court, so as to safeguard the rights of the Church at large and of minorities, and yet to secure the determination of our judicial issues by a real court instead of by a general convention which cannot possibly adequately examine the evidence, which can never be qualified to deal judicially with all the questions of law and which, as a convention, is likely to be swayed and perhaps ought to be swayed by other considerations than those which should govern a real court.

Would it not be possible for your Committee by correspondence to work out some definite proposals, which you could consider together at a meeting in Chicago prior to the General Council meeting on November 29-30th. The Committee on Marriage and Divorce meets on the morning of the 29th. Could you not have a meeting on Monday, the 28th.

With warm regard,

Very cordially yours,

signed Robert E. Speer

RES: C

Personal

July 26, 1927
(dictated July 25)

President Warren H. London, D.D.,
26 Kensington Road,
San Anselmo, California

My Dear President London:

It was a great pleasure to get this morning your letter of June 28th which ought to have reached me long ago, but did not through remissness in the postoffice.

Thank you very much for your most kind and generous words with reference to the Assembly. We certainly have cause for gratitude to God for the triumph of His Spirit in the Assembly in holding us together and in bringing us through some very difficult places. I shudder to think what might have happened that afternoon of the report of the Judicial Commission.

Both during the Assembly and since I have given a great deal of thought to the whole question of our judicial procedure and a fortnight ago wrote a long letter on the subject to the special committee of the General Council which has it under consideration. I am taking the liberty of sending you a copy of this letter herewith. I should be very grateful if you you can add anything to what you have already said so helpfully in your letter of June 28th. I shall submit what you have written to the General Council's Committee.

It was a great joy to be with you at the Assembly ; to have the feeling of confidence that came from your presence and the assurance of your trust All the years that I have known you I have thought of you with deep regard and affection and was very happy when you were willing to join in carrying through the duties of the Assembly.

With warm regard,

Your sincere friend,

Mr. Speer

156 Fifth Avenue
New York City

President Warren H. Landon, D. D.
San Anselmo, California

My dear Dr. Landon:

We were separated at the close of the last session of the Assembly and I had no opportunity to say good-bye to you, or to thank you for all your help and friendship during the Assembly. It was the greatest comfort to sit by your side and to have the feeling of your constant support and confidence.

I think we have a great deal for which to thank God as we look back over the Assembly and I pray that it may be proved to have been the beginning of better and richer things in the life and work of our Church.

Our experience with the report of the Judicial Commission strengthened my conviction that the Assembly is not and can never be made a real court and that we must find some way of dealing with judicial business in the Church that will be more wise and Christian. Our experience that afternoon raised many clear questions in my mind and I hope soon to be able to write these out for the use of the General Council's Committee which is to study this question.

Have you given any thought to the matter? In what form could be set up a permanent court detached from the General Assembly? What ought to be the character and safeguards of such a court?

All of us feel the deepest gratitude to all of our friends in San Francisco who did so much to make our stay during the Assembly so happy and harmonious.

With warm regard,

Your sincere friend,

June fourteenth,
1 9m2 7

Mr. Speer 8 copies

156 Fifth Avenue, New York City

July 18, 1927

Dr. Mark A. Matthews,
Dr. Henry C. Swearingen,
Dr. Charles R. Erdmann,
Dr. J. W. MacIvor,
Mr. A. A. Reed

Dear Friends,

As you know you constitute the Committee to which the General Council has referred for report at its November meeting the questions committed to the Council at the last General Assembly as to the desirability of any changes in the procedure of the Assembly in the matter of judicial cases. The experience of the last Assembly brought to light some of the difficulties which members of the General Council had already foreseen, and other difficulties which had not been foreseen but which were clearly revealed by the tests to which our present rules were put in connection with the consideration of the Report of the Judicial Commission.

For the sake of convenience it may be well to recall the precise language of the present rules.

> "132. Immediately upon the presentation of the preliminary judgment in a case, any member or members of the Commission shall have the right to read and file a dissenting opinion or opinions.
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> 133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:
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> Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the Moderator of the General Assembly shall put the question, without debate, 'Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?"
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> If a majority shall vote in the affirmative, the preliminary judgment of the Permanent Judicial Commission shall be declared by the Moderator to be the final judgment of the General Assembly.
>
> If a majority shall vote in the negative, a motion, debatable except on the merits of the case, will be in order to review the preliminary judgment of the Permanent Judicial Commission.

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This procedure is clear and simple if there is no dissenting opinion and if the General Assembly accepts the preliminary judgment. But, if there is a dissenting opinion or the Assembly does not accept the preliminary judgment, or if both these contingencies occur, then, questions of [illegible] perplexity arise.

1. The rules contain no qualifications whatever with regard to the minority opinion. (a) They do not require that it should be read to the [illegible] or even that the [illegible] should be notified that it is in [illegible] possession. At the last Assembly the Chairman of the [illegible] assumed that the [illegible] had concluded the [illegible] and [illegible] to report to the Assembly with the understanding that no dissenting opinion would be presented and [illegible] until it was just about to come on the platform and the [illegible] had commenced the [illegible] of the [illegible]. (b) Nothing is said as to the extent or limits of such an opinion. It may happen, and usually does happen, in the case of [illegible] dissenting opinions that they do not confine themselves to the scope of the majority opinion but that they introduce personal argument, as it is almost inevitable that they should in order to justify the dissent. It may even happen that such opinions are [illegible] to [illegible] and [illegible] the [illegible] to point this out. The [illegible] has no knowledge in advance and would be in a difficult position if he should interrupt such an opinion or question its propriety.

2. If the Assembly declines to accept the preliminary judgment the only course then allowable is the motion to review the preliminary judgment. The dissenting opinion does not become the motion before the Assembly as some have [illegible] supposed. After the motion to review has been carried, then, it is possible for the Assembly either to sustain, reverse, modify, suspend or remit the preliminary judgment. I suppose it would be possible for it, if it desired, to substitute the dissenting opinion for the preliminary judgment, but this could not be done until after the motion to review the preliminary judgment had been carried. The present rules state that the motion to review is debatable except on the merits of the case." The experience of the last Assembly seemed to indicate that this limitation was [illegible] of enforcement. [illegible] in debating the motion [illegible] the merits of the case. How can the [illegible] this [illegible] [illegible] it [illegible] and any objection to it by the Moderator will be [illegible] to the [illegible] of the Assembly [illegible].

Once the Assembly has voted to review the preliminary judgment and is proceeding to review it the present rules state "that in this review in which of the [illegible] in the case the finding of the facts by the Judicial Commission shall be read.

[illegible] the record of the case to be [illegible] not only the Judicial Commission's finding of the facts to be [illegible] before the Assembly? [illegible] the court [illegible] members of the Commission [illegible] file a dissenting [illegible] a dissenting finding of the facts?

5. Have members of the Judicial Commission any right to speak? [illegible] Assembly the members [illegible] and the dissenting opinion were allowed the right to speak. The [illegible] of the dissenting opinion attempted to make motions [illegible] members of the Assembly to make the motion for him. [illegible] It is im-proper for members of the Judicial Commission to speak, then, ought it to be provided that they shall not be [illegible] at the same time that they are members of the [illegible]. [illegible] it would be difficult to deny their right to speak in any discussion of the motion [illegible] as in any subsequent motion.

6. [illegible] of [illegible] Judicial Commission [illegible]

7. [illegible]

8. This question [illegible] of all [illegible] [illegible] a court [illegible] Judicial [illegible] The Supreme Court and the Congress of the United States [illegible] rule of constitutional procedure [illegible] into a court. [illegible] as such. [illegible] members of the Assembly [illegible] [illegible] a trial [illegible] of the judicatory [illegible] and of the party. [illegible] body. [illegible] the Report of the Commission [illegible] [illegible] or more [illegible] as [illegible].

Of course, it can be left to the sense of the Commissioners to discover the rules but in the excitement of debate they are pretty sure to forget and no Moderator with [illegible] is able [illegible] can [illegible] without something to enforce them.

I think these are the important lessons which observation of the procedure at the last Assembly suggest. The question which arises is as to whether the problem can be best cared for by the simple amendments to the present rules, or whether the subject should be taken, as suggested by Dr. [illegible] and Dr. [illegible], I believe, to establish a real court.

I have received three illuminating suggestions with regard to amendments to the present rules of procedure.

The first is from Dr. Reed, who suggests the following substitute for section 110, which I have quoted at the beginning of this letter:

"110. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:

Upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the following action shall be in order and the Moderator of the General Assembly shall announce and shall directly state that such action has been duly offered and seconded. That is to say, 'That the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly.'

It shall be [illegible] at this point in the procedure, for any member of the Court (any [illegible] commissioner to the General Assembly) to offer the following written motion [illegible]; to wit, 'That the preliminary judgment of the Permanent Judicial Commission be reversed,' accompanied by a brief and concise written statement, without argument, of the reasons for the motion.

Thereupon, without debate, the question shall be put to the Assembly and the vote taken."

The second is from Mr. Lewis, whose view as the General Counsel we must all [illegible] as [illegible] [illegible] at the last Assembly and [illegible] [illegible] the Council [illegible] [illegible] be [illegible].

"1. The term of service for a member of the Judicial Commission should be at least three years.

2. It must be made plain in the judgment that this Commission is the [illegible] [illegible], a Commission, according to the Assembly, and not a Commission [illegible] [illegible] [illegible] to [illegible] as to the [illegible] of [illegible] and [illegible].

3. The right of members of the General Assembly not only to support a dissenting judgment, if such, or [illegible] [illegible] be [illegible] from the floor, should be carefully [illegible].

4. The law should clearly provide that no member of the Judicial Commission, after the judgments have been read, should enter the [illegible], or plead for the judgments, as [illegible] [illegible] [illegible] at the last General Assembly.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] (a) [illegible] (b) [illegible] (c) [illegible] (d) [illegible] (e) [illegible]

[illegible]

Mr. Speer

December 6, 1927

Rev. Mark A. Matthews, D.D.
First Presbyterian Church
Seattle, Washington

My dear Mark:

On the way home from Chicago I read again with the deepest interest and appreciation the report of your committee on our judicial procedure. It seems to me that you have made a notable piece of creative work and that if the Assembly and the Church will adopt the new proposals we shall be carried past many difficulties and into a new dignity and solidity of Church life.

Perhaps it will help you in your purposed revision of your report if I jot down the suggestions that have occurred to me.

1. Would not the difficulty that was suggested with regard to the second paragraph be met by substituting for the last four lines some such words as these - "said nominees to be voted on by the Presbyteries and each nominee to receive for election a majority vote in at least two-thirds of the whole number of Presbyteries voting."

2. When some one asked in the Council meeting what would be the situation if a nominee or all the nominees in one year failed of election by the Presbyteries it was replied that these places would stand vacant until nominations were sent down the following year. The first paragraph on page 2 provides, however, that in the case of failure of election by the Presbyteries the ensuing General Assembly shall elect. Is that the intent of the committee?

3. I do not quite understand the distinction of meaning in the second paragraph on page 2 between the clause "involving judicial jurisdiction" and the clause "requiring judicial adjudication."

4. From the last paragraph on page 3 one would infer that the judgments of the commission were to be final without confirmation by the Assembly. The second paragraph on page 3, however, and the paragraph numbered 5 on page 4, both call for confirmation. Would it not be well on page 2 after the word "shall" at the end of the eighth line from the bottom to insert the words "upon confirmation by the General Assembly."

5. In connection with the third paragraph on page 3, it should be clearly specified that the third judgment of the Judicial Commission shall be final without confirmation by the General Assembly, or if this third judgment is to be made reviewable by the Assembly the processes should be provided for this review. As you will remember, however, with the possible exception of Mr. Ordman, the sentiment seemed to be unanimous in favor of making this third judgment final without either confirmation or review by the Assembly. Perhaps we will need to carefully review this point so that we can all stand together with satisfied mind. It will certainly be a great thing if we can thus create a real court.

6. With regard to paragraph numbered one at the bottom of page 3, we suggest that the last three lines should read - "shall have read the dissent to the Permanent Judicial Commission at least twenty-four hours before its presentation to the Assembly. Provided also such dissenting opinion shall confine itself wholly to the record of the case and [illegible] to the proper limits of such an opinion."

7. Would it be well in paragraphs numbered 3 and 4 on page 4 to substitute for the phrase "adoption or rejection" the single word "consideration"?

8. In paragraph numbered nine on page 5, what is the meaning of the phrase - "the floor of the General Assembly?" Would that allow those who are not members of the court to sit in the gallery or is it the intention to have the Assembly as a court sit absolutely in executive session?

9. Would it not be well to make the language of paragraph number 11 on page 5 and also of the second paragraph on page 6 conform to the statements unanimously adopted on this point by the General Assembly as presented in the report of the Commission of Fifteen. I should think this would help also to meet the difficulty that some might feel in making the judgments of the commission final. We could point out that such judgments while binding in a particular case cannot establish law at variance with the constitution and that the court could later decide another case in accordance with the constitution even if this involved [illegible] rejecting [illegible] previous decisions. In this respect we would be exactly on the same basis as in the case of the United States Supreme Court as indicated as follows:

From Warren - Supreme Court in United States History, Volume III, page 170.

"One other duty towards the Court and towards the public is owed by counsel which should be unflinchingly performed, namely, to insist that the doctrine of stare decisis can never be properly applied to decisions upon constitutional questions. However, the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."

From Works of George Bancroft, Volume IV, page 449.

"To the decision of an underlying question of constitutional law no ..... finality attaches. To endure, it must be right."

From Everett V. Abbott - Justice and the Modern Law.

"Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretations of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. ..... When the bar of the country understands this, and respectfully but inexorably requires of the Supreme

court that it shall continually justify its decisions by the Constitution, and not by its own precedent, we shall gain a new conception of the power of our constitutional guarantees."

10. Your last suggestion on page 6 is that this new legislation with regard to the Assembly's Judicial Commission should be followed in Synodical and Presbyterial Judicial Commissions. Does that mean that in Presbyteries and Synods also there might be three judgments and that there could be no appeal to a higher judicatory until after the third judgment? Or would it be wise to provide in the case of these lower commissions for an appeal to the higher judicatory after the first judgment. A number of our Presbyteries and Synods now have legislation which makes the judgment of their Judicial Commissions final without review, subject only to appeal to a higher court.

Let me say again how grateful I am, and I am sure every other member of the Council, for the courageous and constructive work which your committee has done.

With warm regard,

Very cordially yours,

RES/B

P.S. - Since writing this letter your good note from the railroad train with regard to the American Colony in Jerusalem, is just received. Mrs. Speer and I have already been trying to make arrangements to stay at the American Colony and I shall be glad to follow the matter up with Mr. White. A number of friends have told us that we must by all means go there if we can.

It was good to be with you again in Chicago, and I trust that you are going to have better health than ever this coming year.

R.E.S.

Judicial Com.

Mr. Speer

November 14,1927
Dictated 9th.

The Rev. Mark A. Matthew, D.D.,
Seattle,
Washington.

My dear Mark,

I have just received from Dr. Mudge the preliminary docket of the General Council meeting, convening in Chicago, Wednesday, November 30th at 10:00 A.M. The meeting of the Committee on Marriage and Divorce comes the preceding day, and I presume may take the whole day. I hope, accordingly, that you are planning to get your Committee on Judicial Procedure together on Monday, November 28th. You will have to be away from your pulpit on Sunday no doubt, and Dr. Swearingen could easily come down Sunday night, and Dr. McIvor come from St. Louis, and I should suppose that you will need pretty much a full day for your discussions if you are to be ready with definite recommendations for the Council.

Very cordially yours,

WWS:C.

October 31,1927
Dictated 28th.

The Rev. Mark A. Matthews, D.D.,
Seventh and Spring Streets,
Seattle, Wash.

My dear Mark,

Just for the sake of clarifying my own mind I have set down the enclosed very tentative statement on the subject of the teaching of the New Testament with regard to marriage and divorce. Will you read it over and criticise it in any way, or tell me if in any particular you think the provisional views set forth in this statement are unsound? I judge that I have only embodied your own much more mature and better informed judgment.

Ever faithfully yours,

WPS:C.

Mr. Speer

156 Fifth Avenue, New York City

July 18th, 1927

Dr. Mark A. Matthews,
Dr. Henry C. Swearingen,
Dr. Charles R. Erdmann,
Dr. J. W. MacIvor,
Mr. A. A. Reed

Dear Friends,

As you know you constitute the Committee to which the General Council has referred for report at its November meeting the questions committed to the Council at the last General Assembly as to the desirability of any changes in the procedure of the Assembly in the matter of judicial cases. The experience of the last Assembly brought to light some of the difficulties which members of the General Council had already foreseen, and other difficulties which had not been foreseen but which were clearly revealed by the tests to which our present rules were put in connection with the consideration of the Report of the Judicial Commission.

For the sake of convenience, it may be well to recall the precise language of the present rules.

> "132. Immediately upon the presentation of the preliminary judgment in a case, any member or members of the Commission shall have the right to read and file a dissenting opinion or opinions.
>
> "133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:
>
> Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the Moderator of the General Assembly shall put the question, without debate, 'Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?'
>
> If a majority shall vote in the affirmative, the preliminary judgment of the Permanent Judicial Commission shall be declared by the Moderator to be the final judgment of the General Assembly.
>
> If a majority shall vote in the negative, a motion, debatable except on the merits of the case, will be in order to review the preliminary judgment of the Permanent Judicial Commission.

"134. The preliminary judgment in any case when reviewed by the General Assembly to which it has been reported, may be affirmed, reversed, modified, suspended, or remitted for further hearing. In this review, instead of the record in the case, the finding of the facts by the Judicial Commission shall be read. On such review, if the case be not remitted, the decision of the General Assembly shall be held to be its final judgment. If the case be not reviewed by the General Assembly to which it has been reported, or if it be reviewed and no decision be reached, then at the dissolving of the same the preliminary judgment of the Permanent Judicial Commission shall be held to be the final judgment of the General Assembly."

This procedure is clear and simple if there is no dissenting opinion and if the General Assembly accepts the preliminary judgment. But, if there is a dissenting opinion or the Assembly does not accept the preliminary judgment, or if both these contingencies occur, then, questions of increasing perplexity arise.

1. The rules contain no qualifications whatever with regard to the minority opinion. (a) They do not require that it should be read to the Commission or even that the Commission should be notified that it is to be presented. At the last Assembly the Chairman of the Commission stated that the Commission had concluded its business and adjourned to report to the Assembly with the understanding that no dissenting opinion would be presented and it did not know of such opinion until it was just about to come on the platform and the Moderator had announced the appearance of the Commission. (b) Nothing is said as to the nature or limits of such an opinion. It may happen, and usually does happen, in the case of minority opinions, that they do not confine themselves to the scope of the majority opinion and that they introduce personal argument, as it is almost inevitable that they should in order to justify the dissent. It may even happen that such opinions are inappropriate in their form or content but if unread to the Commission there is no chance to point this out. The Moderator has no knowledge in advance and would be in a difficult position if he should interrupt such an opinion or question its propriety.

2. If the Assembly declines to accept the preliminary judgment the only motion then allowable is the motion to review the preliminary judgment. The dissenting opinion does not become the motion before the Assembly as some have erroneously supposed. After the motion to review has been carried, then, it is possible for the Assembly either to confirm, reverse, modify, suspend or remit the preliminary judgment. I suppose it would be possible for it, if it desired, to substitute the dissenting opinion for the preliminary judgment, but this could not be done until after the motion to review the preliminary judgment had carried. The present rules state that the motion to review is "debatable except on the merits of the case". The experience of the last Assembly seemed to indicate that this limitation was impossible of enforcement. Both sides in debating the motion went into the merits of the case. How can the Moderator enforce this provision? He does not know in advance what is to be said; when it has once been said it cannot be unsaid and any objection to it by the Moderator will be unacceptable to the part of the Assembly whose view it represents.

When the Assembly has voted to review the preliminary judgment and in proceeding to review it the present rules state "that in this review instead of the record in the case the finding of the facts by the Judicial Commission shall be read.

(a) Now is the record of the case to be excluded and only the Judicial Commission's finding of the facts to be permitted to come before the Assembly? (b) Does the right of any member or members of the Commission to read and file a dissenting opinion involve also their right to present a dissenting finding of the facts?

3. Have members of the Judicial Commission any right to speak? At the last Assembly the members who presented the preliminary judgment and the dissenting opinion both claimed the right to speak. The presenter of the dissenting opinion attempted to make motions and when this was objected to he asked some members of the Assembly to make the motion for him. No one knew that he was expecting to do this and once it was done it could not be undone. If it is improper for members of the Judicial Commission to speak, then, ought it to be provided that they shall not be Commissioners at the same time that they are members of the Commission? As Commissioners it would be difficult to deny their right to speak in any discussion of the motion to review or in any subsequent motion.

4. Is there need of clarifying the application of the rule that members of judiciaries who are parties to an appeal may not deliberate or vote? Some of our lawyers contend that this rule would not apply to Commissioners from presbyteries of a delegated Synod who were not actually members of the Synod meeting whose actions are the subject of appeal or protest.

5. If errors had been committed in the consideration of a judicial Commission report and the Assembly desired on the following day to reconvene as a court and reconsider the matter, how could this be done? If provision is to be made for this, ought not the Judicial Commission to be required to remain at the Assembly until the end? Even if it does, however, can the Assembly itself be so accurately reconstituted on the following day as to involve the same personnel?

6. This question suggests the gravest of all, namely, as to whether the General Assembly is or ever can be made a genuine court? It may, of course, verbally be called a court, but can it ever possess the judicial temper and meet the intellectual and moral and spiritual requirements of a court? By nature and constitution the General Assembly is a convention or assembly, and the problem which is in the minds of many is as to whether any change whatever in rules of procedure can reach the real root of our problems? It is said that our Government and our Church are built on the same model, but in this particular they are fundamentally and radically different. The Supreme Court and the Congress of the United States are not the same body and never could be. No legislation or mere rule of constitutional procedure could ever turn Congress into a court. Again and again our Assembly, though constituted as a court has been disqualified in acting as such. People who are not members of the Assembly have sat in it and have made suggestions to its members. The Book of Discipline provides that "no member of a judiciary who has not been present during the whole of a trial shall be allowed to vote on any question arising therein except by unanimous assent of the judiciary and of the party." It has been justly criticized that some interested parties voted in the last General Assembly. That was true of more than one case and of representatives of more than one body. A number of commissioners came in during the Report of the Commission and voted. The ushers had been instructed to guard the entrance but at one important point a large group of Commissioners, 20 or 30 or more, found an unguarded entrance between the curtains and came in and participated.

Of course, it can be left to the honor of the Commissioners to observe the rules but in the excitement of issues they are pretty sure to forget and no Moderator will be able impartially and absolutely without exception to enforce them.

I think these are the important issues which observation of the procedure at the last Assembly suggest. The question which arises is as to whether the problem can be best cared for on the whole by amendments as to the present rules or whether the attempt should be made, as suggested by Dr. Matthews and Dr. Swearingen, I believe, to establish a real court.

I have received three illuminating suggestions with regard to amendments in the present rules of procedure.

The first is from Mr. Reed, who suggests the following substitute for Section 133, which I have quoted at the beginning of this letter:

> "133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission and of a dissenting opinion or opinions, if any, shall be as follows:
>
> Upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the following motion shall be in order and the Moderator of the General Assembly shall assume and shall clearly state that such motion has been duly offered and seconded; that is to say, "That the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly."
>
> It will be permissable at this point in the procedure, for any member of the Court (any enrolled commissioner to the General Assembly) to offer the following written motion(for a substitute); to wit, 'That the preliminary judgment of the Permanent Judicial Commission be reviewed,' accompanied by a brief and concise written statement, without argument, of the salient reasons for the motion.
>
> Thereupon, without debate, the question shall be put to the Assembly and the vote taken."

The second is from Dr. McCartney, whose loss on the General Council we must all lament as his ex officio term expired at the last Assembly and there was no vanancy to which he could be appointed on the Council.

> "1. The term of service for a member of the Judicial Commission ought to be five years.
>
> 2. It must be made plain to the Chairman that this Commission is in reality only a Committee, reporting to the Assembly, and not a Commission from whose judgment there is no appeal, as in the case of presbyteries and Synods.
>
> 3. The right of members of the General Assembly not only to support a dissenting judgment, if read, or another motion ~~is~~ reivew from the floor, should be carefully guarded.
>
> 4. The law should clearly provide that no member of the Judicial Commission, after the judgments have been read, should argue the case, or plead for the judgments; as did Judge Brace at the last General Assembly.

5. Members of Judicatories complained against, should not have a vote in the Assembly, when the case of such Judicatory is up for consideration."

The third is from Dr. Mudge, who suggests the following substitute for Sections 132 and 133:

Section 132. Immediately upon the presentation of the preliminary judgment in a case, any three members of the Commission shall have the right to read and file a dissenting opinion, provided said opinion has been read in full and filed at a sitting of the Permanent Judicial Commission, held at least twenty-four hours prior to said presentation. If there be a dissenting opinion, the majority of the Commission may read and file a rejoinder immediately following the presentation to the General Assembly of said dissenting opinion.

Section 133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any , and of a rejoiner or rejoiners therein, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, and the rejoiner or rejoiners thereto, if any, the Moderator of the General Assembly shall put the question, without debate, 'Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?'

If a majority shall vote in the negative, then the finding of the facts by the Permanent Judicial Commission shall be read and a action debatable, except as to said facts, will be in order to review the preliminary judgment of the Permanent Judicial Commission."

I have raised with Dr. Macartney the question as to whether the conception of the Judicial Commission as only a Committee of the Assembly may not raise added difficulties. (a) Would it not tend to make our procedure even less judicial than it now is and to make the Assembly itself the court to hear the whole case? (b) Would this conception not tend to encourage the election of the members of the Judicial Commission as regular Commissioners as is done now in the case of important Committees, in order that the members of these Committees might have the full rights of Commissioners in debate? (c) Would it not especially accomplish the very thing which Dr. Macartney would guard against in his fourth suggestion, inasmuch as if the Commission is only a Committee its Chairman would have the right under our rules to argue for the Commission's report and to participate in the debate? (d) If the Commission is only a Committee, then, a motion to substitute the minority report for the majority report is at once allowable contrary to the provision of Section 133 with regard to the Report of the Judicial Commission. (e) Will it be possible for any Moderator to enforce in a free General Assembly discussion the limitation specified in Section 133 in the phrase "debatable except on the merits of the case.", and, in Section 134, the exclusion from the Assembly's review of the record of the case and the admission only of "the finding of the facts by the Judicial Commission."

It may be that the Church would not be satisfied to transfer from the

General Assembly to a permanent court, meeting at some other time in the year, the right of final decision. One make, however, whether the attempt to decide judicial questions in a general convention like the Assembly can ever be anything but unsatisfactory? Perhaps safeguards can be discovered however which will retain our present scheme of popular govenment in this matter and escape, at least, its gravest difficulties. Or, on the other hand, it may be possible to frame provision for a permament court, so as to safeguard the rights of the Church at large and of minorities, and yet to secure the determination of our judicial issues by a real court instead of by a general convention which cannot possibly adequately judge the evidence, which can never be qualified to deal judicially with all the questions of law and which, as a convention, is likely to be swayed and perhaps ought to be swayed by toher considerations than those which should govern a real court.

Would it not be possible for your Committee by correspondence to work out some definite proposals, which you could consider together at a meeting in Chicago prior to the General Council meeting on November 29-30th. The Committee on Marriage and Divorce meets on the morning of the 29th. Could you not have a meeting on Monday, the 28th.

With warm regard,

Very cordially yours,

signed Robert E. Speer

RES: C

Judicial Committee

July 18,1927

The Rev. Mark A. Matthews, D.D.,
Seattle, Washington.

My dear Mark,

I enclose herewith a copy of a letter addressed to your Committee on Judicial Procedure. I am writing also to enclose a list of books on Marriage and Divorce made out by Dr. Dulles, the Librarian of Princeton Theological Seminary. Will you not make a point to put in some time this summer on this problem, studying both the New Testament teaching and the general question of wise Church policy and legislation, and also giving some thought to the matter of what we can do in the Church, either through the seminaries or the pastorate in the way of wise and helpful teaching and training of our people.

I trust that you are in better health than you have been and that you may have a good and restful summer.

With kind regards,

Very cordially yours,

RES:C.
Encs (2)

Judicial Com

Mr. Speer

156 Fifth Avenue
NewYork City, N.Y.
June 14, 1927.

Reverend Mark A. Matthews, D.D.
First Presbyterian Church
Seattle, Washington.

My dear Mark:

I hope to send out through Dr. Mudge soon the Committee appointments on the General Council for the new year.

I am very glad to have your note of June 6th with reference to the Committee on rules of judicial procedure. I think your suggestions are very good except that instead of Mr. Shattuck or myself I think it would be better to add Dr. Erdman so that the Committee would consist of you as Chairman, Dr. Swearingen, Dr. Erdman, Dr. McIvor and Mr. Reed. Dr. Mudge and I as ex-officio can work with you in any way desired.

I have given a good deal of thought to the matter since our experience with the report of the Judicial Commission and shall try to write you before long stating some of the questions which that experience has raised in my mind, supplementing the grave questions which you and Dr. McCartney and I have felt throughout the work of this last year with regard tomthis problem.

I want to thank you again for all your friendship and sympathy and support throughout the Assembly. You were a staunch, faithful friend and I can't begin to tell you the comfort that it was to know that you were there and that I could count absolutely upon your confidence and help.

I trust that we are going to have a good year together and that something may be worked out in the matter of our judiciary procedute that will mark the beginning of a new era in our Church. As far as I know our calendar is pretty clear now of troublesome cases and we ought to be able to do a piece of real creative and constructive statesmanship if only we can be given wisdom and grace for the task.

With warm regard,

Your sincere friend,

RES/B

C. E. MacCartney

First Presbyterian Church

Sixth Avenue
Pittsburgh, Pa.

June 24, 1927.

Dr. Robert E. Speer,
156 Fifth Ave.,
New York, N.Y.

Dear Dr. Speer;

Inasmuch as my term on the General Council has expired, and I was not re-elected at the last General Assembly, it will be necessary for you to appoint another Chairman for the important Committee which was commissioned to revise our judicial procedure. I enclose correspondence from Mr. Reed, who is a member of the Committee. My study thus far gives me the following impressions;

1. The term of service for a member of the Judicial Commission ought to be five years.

2. It must be made plain to the Chairman that this Commission is in reality only a Committee, reporting to the Assembly, and not a Commission from whose judgment there is no appeal; as in the case of Presbyteries and Synods.

3. The right of members of the General Assembly not only to support a dissenting judgment, if ~~not~~ read, or another motion to review from the floor, should be carefully guarded.

4. The law should clearly provide that no member of the Judicial Commission, after the judgments have been read, should argue the case, or plead for the judgments; as did Judge Bruce at the last General Assembly.

5. Members of Judicatories complained against, should not have a vote in the Assembly, when the case of such Judicatory is up for consideration.

With the assurance of my prayers for a year of great usefulness and happiness as Moderator of our Church, I am

Faithfully yours,

C. E. MacCartney

CEM/RRH

P.S. When can you take charge of the 1st Church?

C. E. M.

2097

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IN REPLYING PLEASE QUOTE INITIALS

June 3, 1927.

Rev. Clarence E. Macartney, D. D.,
C/o First Presbyterian Church,
Pittsburgh, Pennsylvania.

My dear Dr. Macartney:

With reference to the procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, I am venturing to inclose herewith a proposed substitute for Section 133 of the Manual for your consideration and study.

With kind regards and all good wishes, I am

Yours very truly,

Albert A Reed

AAR.B

Substitute for Section 133, Manual of the General Assembly of the Presbyterian Church in the U. S. A., 1927 Edition.

133. The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, shall be as follows:

Upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, the following motion shall be in order and the Moderator of the General Assembly shall assume and shall clearly state that such motion has been duly offered and seconded; that is to say, "That the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly."

It will be permissible at this point in the procedure, for any member of the Court (any enrolled commissioner to the General Assembly) to offer the following written motion (as a substitute); towit, "That the preliminary judgment of the Permanent Judicial Commission be reviewed," accompanied by a brief and concise written statement, without argument, of the salient reasons for the motion.

Thereupon, without debate, the question shall be put to the Assembly and the vote taken.

Mr. Speer

153 Fifth Avenue
New York City, N.Y.
June 14, 1927

Reverend Lapsley A. McAfee, D.D.
2407 Dana Street
Berkeley, California

My dear Lapsley:

It was such a joy to get that one glimpse of you at least during the Assembly. I only wish you might have been with us through all the sessions and especially that we might have had you on the platform with the Commission when our report was read and then later when it was adopted unanimously by a rising vote without one word of discussion although I asked the Assembly several times if it did not wish to take up the report before voting upon it.

I think we have great reason to be thankful to God for the solid and constructive work that was done in our two reports and for the summons which has come out of them to the Church to greater loyalty to our constitution and ordered government. It was interesting to see also in the Assembly the solid weight of its evangelical conviction. There was no doubt whatever as to what the mind of the Church is on the great historic affirmation. What we need now is the spirit of love in the great living effort to make Christ known and to win men to Christ.

I trust that you are continuing to gain and that you may improve every day sensibly and perceptibly.

Judicial Com.

I wish you would put your mind on the question of the necessary reform in our modes of judicial procedure. We nearly went on the rocks the afternoon the Judicial Commission reported. We had a clear revelation then of the truth that we must devise some better and more Christian way of dealing with our judicial business. There are many who have felt that we ought to try to work out a real court detached from the Assembly, which as our experience this last time again demonstrated can never be made a real court. It is too large and many of its members are not competent for judicial service. The work that must be done in settling judicial cases cannot be done in such a large body.

What in your judgment should be the character of a court that we might have and what its safeguards and conditions?

It has been good to have this closer fellowship with you the last two years. With warm regard, Yours sincere friend

LAPSLEY A. McAFEE. D. D.
PASTOR

Lapsley A McAfee

ROBERT W. MACDONALD
CLERK OF SESSION

The First Presbyterian Church
of Berkeley, California
DANA STREET AT CHANNING WAY

PAULINE BAKER
SECRETARY

THE CHURCH OFFICE
2407 DANA STREET

Friday, July 8th 1927

My Dear Robert:--

It was very good of you to write me. You must have other things that fill your time. I appreciate your thinking of me and giving me so much of your time. It is decreed now that I am to be back on duty the first of August. That is almost here. I am leaving today for Southern California to remain throughout this month. I hope that you are going to have a good vacation. It pays to take time off from work and keep in good condition. That is where I have missed the mark. I have thought that I could run too steadily..

All reports of The Assembly are good. I wish that I might have been among the men more. You were greatly blessed in your leadership. On all sides I hear good words of your administration. And the year bids fair to be one of advance. May you be kept in all strains!

Yours Most Cordially,

Lapsley A. McAfee

Lewis S. Mudge

The Presbyterian Church in the United States of America

OFFICE OF THE GENERAL ASSEMBLY

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June 15, 1927.

Dr. Robert E. Speer,
156 Fifth Ave.,
New York City.

My dear Bobby:

Since our departure from San Francisco, I have given much thought to the procedure in connection with the presentation of the preliminary judgments of the Permanent Judicial Commission. I am enclosing some amendments to Book of Discipline, Sections 132 and 133, said sections being by general consent the center of our recent difficulties. I shall be glad to confer with you concerning these suggested changes. Of course, I do not consider them in their present form final. The phrasing, I suppose, may be readily improved. The content is the main thing, but it would seem to me that they contain remedies for present ills.

Moreover, I have a very strong suspicion that a Permanent Judicial Commission endowed with final authority, will be rejected by the Church. I seriously doubt whether it will be at all worth while pushing down to the presbyteries overtures which would place in our fundamental law, authority for the establishment and continuance of such a body. My personal conviction is that the way out is through the suggesting of amendments to the above cubicled sections, and such amendments as will meet the weaknesses already discovered. If such amendments, as those suggested above or similar ones, were made and given a fair trial, and were found insufficient, then a much stronger case could be made for a Permanent Judicial Commission clothed with final authority. Perhaps we may have an opportunity to consider the amendments mentioned above next Thursday.

Very affectionately yours,

Lewis S. Mudge

Lewis S. Mudge
Stated Clerk

The Presbyterian Church in the United States of America

OFFICE OF THE GENERAL ASSEMBLY

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BOOK OF DISCIPLINE, Section 132

Immediately upon the presentation of the preliminary judgment in a case, any three members of the Commission shall have the right to read and file a dissenting opinion, provided said opinion has been read in full and filed at a sitting of the Permanent Judicial Commission, held at least twenty-four hours prior to said presentation. If there be a dissenting opinion, the majority of the Commission may read and file a rejoiner immediately following the presentation to the General Assembly of said dissenting opinion.

Section 133.

The procedure in connection with the presentation to the General Assembly of the preliminary judgment of the Permanent Judicial Commission, and of a dissenting opinion or opinions, if any, and of a rejoiner or rejoiners thereto, if any, shall be as follows:

Immediately upon the conclusion of the reading of the preliminary judgment of the Commission in any case, and of the dissenting opinion or opinions, if any, and the rejoiner or rejoiners thereto, if any, the Moderator of the General Assembly shall put the question, without debate, "Shall the preliminary judgment of the Permanent Judicial Commission be made the final judgment of the General Assembly?"

If a majority shall vote in the affirmative, the preliminary judgment of the Permanent Judicial Commission shall be declared by the Moderator to be the final judgment of the General Assembly.

If a majority shall vote in the negative, then the finding of the facts by the Permanent Judicial Commission shall be read and a motion debatable, except as to said facts, will be in order to review the preliminary judgment of the Permanent Judicial Commission.

A. A. Reed

670 Marion St.
Denver, Colo.

Five Pines
Estes Park, Colorado

Mr. Speer

August 24th 1927

My dear Dr. Speer, —

Enclosed a few vacation thoughts about judicial procedure, which may be placed in the basket with other suggestions.

I suppose we should develop the principles before attempting to formulate amendments or new rules.

Will mail a copy to Dr Matthews.

Trust you have had a fine rest in the hills of Litchfield County

Cordially

Albert A. Reed

Albert A. Reed -

Mr. Speer

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IN REPLYING PLEASE QUOTE INITIALS

RECEIVED
JUL 29 1927
Mr. Speer

July 26, 1927.

Robert E. Speer, D. D.,
C/o Board of Foreign Missions, Presbyterian Church,
156 Fifth Avenue,
New York City, New York.

My dear Dr. Speer:

Permit me to thank you for your letter of recent date with reference to the procedure of the General Assembly in the consideration of judicial cases.

You may recall that I was compelled to leave San Francisco before the adjournment of the General Assembly, and therefore had no opportunity to observe the events incident to the consideration of the report of the Permanent Judicial Commission.

The suggestions made by me several weeks ago with reference to Section 133, were written en route from San Francisco to Denver, and are entirely inadequate to meet the situation as it has developed. It is my present purpose to study the questions raised by your letter, and thereafter to prepare a memorandum of my views. This will probably be done during my vacation in August. I shall, of course, send you a copy of the memorandum, a duplicate of which will be forwarded to Doctor Matthews.

Permit me to add a personal word. Connecticut is my native state and Sharon my native town. My ancestors lived for many generations in the towns of Sharon and Salisbury. Our daughter Esther (Mrs. Albert C. Roberts) is living at Lakeville, her husband being engaged in mercantile business there. Esther wrote us recently that you had purchased a home near Lakeville. I hope that you may chance to meet her during the summer.

With kind personal regards,

Yours cordially,

Albert A. Reed

AAR N

Mr. Speer

September 12,1927

Mr. Albert A. Reed,
670 Marion Street,
Denver, Colo.

My dear Mr. Reed,

It was a great pleasure to get your letter of August 24th with your most helpful suggestions with regard to procedure of our Church in the matter of judicial cases. I have read your paper with the greatest interest and am inclined to agree with you that if we can plan a real court it would be wise to do so, otherwise probably as you intimate Dr. Hodge's suggestion for an amendment of our present procedure will be best.

Will you not put your mind on the problem of proper nature and safeguards of a real court and the extent to which its judgments could be made final and the extent to which the right of review should be reserved to the Assembly?

I spent the month of August in Lakeville. Part of the time I was working on the biography of Dr. Ewing, for so many years one of our missionaries in India, and at the time of his death President of our Board. The rest of the time I put in in manual labor on the little place which we have bought just a mile out of Lakeville on the new state road to Millerton, and a beautiful view southward over the hills and valleys of Sharon.

It was a great pleasure to see your daughter several times, and to worship with her and her husband in the old Salisbury church.

With kind regard,

Very cordially yours,

RMS:C.

July 29, 1927

Mr. Albert A. Reid,
United States National Bank,
Denver, Colo.

My dear Mr. Reid:

Your good letter of July 26 is just received. I hope you will put your mind hard at work on this problem because we shall certainly have constant trouble over it until we reach a better solution than we have now. I wish you could have been present at the report of the Judicial Committee and could have seen what the perils and difficulties of our present proceedure are.

I have had a good letter on the subject from Dr. Swearingen and have received some additional very helpful suggestions from Dr. Landon which I will submit to the Committee later. I shall look forward to getting the memorandum which you hope to prepare some time during your vacation.

I am hoping to get away for a few weeks, if possible, for the whole of August and shall be spending most if not all of the time in our new country home near Lakeville. It is good to know that this is your ancestral home and that you were born in Sharon. I trust that you will be coming back to visit Litchfield County and your daughter. I shall look forward to meeting her some time next month.

With kind regard,

Very cordially yours,

RES/V

HENRY CHAPMAN SWEARINGEN, MINISTER
C. MARSHALL MUIR, ASSISTANT MINISTER

Henry C. Swearingen

RAYMOND G. FLETCHER, DIRECTOR OF RELIGIOUS EDUCATION
R BUCHANAN MORTON, ORGANIST & DIRECTOR OF MUSIC

Mr. Speer

SECRETARIES
MISS MARIAN DUNNING
MISS CAROLINE CLARK

House of Hope Presbyterian Church

ST. PAUL, MINNESOTA

DEC 23 1927

December 19, 1927

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The Rev. Robert E. Speer, D.D.
156 Fifth Ave.,
New York, N. Y.

Dear Robert:-

Thank you for your letter of December 6th enclosing copy of communication to Dr. Matthews.

It is proper to say that the report which was presented to the General Council regarding the permanent Judicial Commission was designed to cover general principles only. The Committee did not discuss the wording, leaving that to Dr. Matthews. He explained to me that he did not read over the rough draft after having received it from the typist.

Your suggestions are much to the point as usual. We expect to have another meeting before bringing the matter to the attention of the Council. Each of us will have certain suggestions to offer and our hope is that we may prepare a paper which the Council can discuss with respect to specific expressions.

The last thing Dr. Erdman said to me when I was leaving the hotel in Chicago, was that he is now fully satisfied with the report and would have no further hesitancy in agreeing with his brethren of the Council on the one point about which he appeared to be in doubt.

A unanimous report from the Council should go far toward commending these important changes to the General Assembly and to the Presbyteries. I rejoice that there is prospect that the church will take this important forward step regarding its procedure in judicial matters.

With all good wishes and with the greetings of the season, I remain,

Cordially yours,

Henry Chapman Swearingen

Henry Chapman Swearingen

HCS CC

Mr. Speer

December 6, 1927

Rev. Henry C. Swearingen, D.D.,
760 Summit Avenue
St. Paul, Minn.

My dear Henry:

I enclose herewith carbon copy of a letter which I have just written to Dr. Matthews.

With warm regard,

Yours sincerely,

RES/B

December 6, 1927

Rev. Earl L. Matthews, D.D.
First Presbyterian Church
Seattle, Washington

My dear Earl:

On the way home from Chicago I read again with the deepest interest and appreciation the report of your committee on our judicial procedure. It seems to me that you have done a notable piece of creative work and that if the Assembly and the Church will adopt the new procedure we shall be carried past many difficulties and into a new dignity and solidity of Church life.

Perhaps it will help you in your purposed revision of your report if I set down the suggestions that have occurred to me.

1. Could not the difficulty that was suggested with regard to the second paragraph be met by substituting, for the last four lines some such words as these - "said nominees to be voted on by the Presbyteries and such nominee to receive for election a majority vote in at least two-thirds of the whole number of Presbyteries voting."

2. When some one asked in the Council meeting what would be the situation if a nominee or all the nominees in one year failed of election by the Presbyteries it was replied that these places would stand vacant until nominations were sent down the following year. The first paragraph on page 2 provides, however, that in the case of failure of election by the Presbyteries the General Assembly shall elect. Is that the intent of the committee?

3. I do not quite understand the distinction of meaning in the second paragraph on page 3 between the clause "involving judicial jurisdiction" and the clause "requiring judicial adjudication."

4. From the last paragraph on page 3 one would infer that the judgments of the commission were to be final without confirmation by the Assembly. The second paragraph on page 5, however, and the paragraph numbered 5 on page 4, both call for confirmation. Would it not be well on page 2 after the word "annul" at the end of the eighth line from the bottom to insert the words "upon confirmation by the General Assembly."

5. In connection with the third paragraph on page 3, it should be clearly specified that the third judgment of the Judicial Commission shall be final without confirmation by the General Assembly, or if this third judgment is to be made reviewable by the Assembly the processes should be provided for this review. As you will remember, however, with the possible exception of Mr. Truman, the sentiment seemed to be unanimous in favor of making this third judgment final without either confirmation or review by the Assembly. Perhaps we will want to carefully review this point so that we can all stand together with satisfied mind. It will certainly be a great thing if we can thus create a real court.

6. With regard to paragraph number one at the bottom of page 3, we agreed that the last three lines should read - "shall have read the dissent to the Permanent Judicial Commission at least twenty-four hours before its presentation to the Assembly. Provided also such dissenting opinion shall confine itself wholly to the record of the case and ~~xxxxxxxxxxxxxxxxxxxx~~ to the proper limits of such an opinion."

7. Would it be well in paragraphs numbered 3 and 4 on page 4 to substitute for the phrase "adoption or rejection" the simple word "consideration"?

8. In paragraph number one on page 5, what is the meaning of the phrase - "the floor of the General Assembly?" Would that allow those who are not members of the court to sit in the gallery or is it the intention to have the Assembly as a court sit absolutely in executive session?

9. Would it not be well to make the language of paragraph number 11 of page 5 and also of the second paragraph on page 6 conform to the statements unanimously adopted on this point by the General Assembly as presented in the report of the Commission of Fifteen. I should think this would help also to meet the difficulty that some might feel in making the judgments of the commission final. We could point out that such judgments while binding in a particular case cannot establish law at variance with the constitution and that the court could later decide another case in accordance with the constitution even if this involved ~~xxx~~ rejecting ~~xxxxxxxxxxxxxxxxx~~ previous decisions. In this respect we would be exactly on the same basis as in the case of the United States Supreme Court as indicated as follows:

From Warren - Supreme Court in United States History, Volume III, page 470.

> "One other duty towards the Court and towards the public is owed by counsel which should be unflinchingly performed, namely, to insist that the doctrine of stare decisis can never be properly applied to decisions upon constitutional questions. However, the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."

From Works of George Bancroft, Volume IV, page 49.

> "To the decision of an underlying question of constitutional law no ..... finality attaches. To endure, it must be right."

From Everett V. Abbott - Justice and the Modern Law.

> "Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretations of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. ..... When the bar of the country understands this, and respectfully but inexorably requires of the Supreme

court that it shall continually justify its decisions by the Constitution, and not by its own precedent, we shall gain a new conception of the power of our constitutional guarantees."

10. Your last suggestion on page 6 is that this new legislation with regard to the Assembly's Judicial Commission should be followed in Synodical and Presbyterial Judicial Commissions. Does that mean in Presbyteries and Synods also there might be three judgments and that there could be no appeal to a higher judicatory until after the third judgment? Or would it be wise to provide in the case of these lower commissions for an appeal to the higher judicatory after the first judgment. A number of our Presbyteries and Synods now have legislation which makes the judgment of their Judicial Commissions final without review, subject only to appeal to a higher court.

Let me say again how grateful I am, and I am sure every other member of the Council, for the courageous and constructive work which your committee has done.

With warm regard,

Very cordially yours,

WJ/B

Mr. Speer

September 12,1927

The Rev. Henry C. Swearingen, D.D.,
760 Summit Avenue,
St. Paul, Minn.

My dear Henry,

I enclose herewith a copy of a memorandum prepared by Mr. A. A. Reed with reference to our judicial procedure. He has sent a copy directly to Dr. Matthews and I am sending a copy to Dr. Erdman.

I trust that you have had time this summer to give careful consideration to the matter and will be prepared at the meeting of the Committee in Chicago, in November, to offer some definite proposals with regard either to the establishment of a court of final jurisdiction or a court with the jurisdiction final within certain limits and Subject otherwise to review by the Assembly. Or, if you think such a proposal too extreme, then, will you not be ready with suggestions regarding the amendment of our present mode of procedure which will give the Church more protection than it possesses now against unwise and disturbing possibilities.

Very cordially yours,

RMS:C.

October 31,1927
Dictated 28th.

The Rev. Henry C. Swearingen, D.D.,
780 Summit Avenue,
St. Paul, Minn.

My dear Henry,

I have tried to jot down, just for the sake of clearing my own mind, some provisional conclusions with regard to the teaching of the New Testament in the matter of marriage and divorce. I think I told you at St. Paul that I had been making these notes on the train. Will you be good enough to read them over. In connection with paragraph two, please read carefully again the two passages referred to. Have I got things straight in this statement? I should be very much interested in hearing at the next meeting of our Committee the views that may be expressed with regard especially to the question involved in the closing paragraph.

It was a great pleasure to be with you in St. Paul, and with warm regard always, I am,

Your sincere friend,

RES:C.

HENRY CHAPMAN SWEARINGEN, MINISTER
C. MARSHALL MOIR, ASSISTANT MINISTER

RAYMOND G. FLETCHER, DIRECTOR OF RELIGIOUS EDUCATION
R. BUCHANAN MORTON, ORGANIST & DIRECTOR OF MUSIC

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MISS MARIAN DUNNING
MISS CAROLINE CLARK

House of Hope Presbyterian Church

ST. PAUL, MINNESOTA

July 14, 1927

Robert E. Speer, D.D.,
156 Fifth Avenue,
New York, N. Y.

Dear Robert:-

Replying to yours of June 22nd in reference to vacancies on the permanent Judicial Commission, will say that by far the most available man, according to my estimate, to be found in the northwest, is the Hon. Clifford L. Hilton, Attorney-General of Minnesota. Mr. Hilton has held this office for ten years and has made a notable record. He is a Director of McCormick Theological Seminary, and a Trustee of Macalester College and Secretary of the Board. Has been President of the Attorney-Generals Association of the U. S. and was one of the twenty-four members of the American Bar Association who represented that organization officially at the joint meeting in London with the British Bar two years ago.

Mr. Hilton is one of the finest men personally I have ever known, fairminded, and faithful. He is an elder, Superintendent of the Sunday School and active in every line of Christian work.

The only objection that could possibly be brought against Mr. Hilton's appointment might be that he is a member of the House of Hope Church. I have no disposition to urge the selection of a man from our Session since I happen to be a member of the General Council, but I am giving you my judgment as to the most available person for the position as far as personal qualifications are concerned. Can think of no lawyer in these regions who is quite in Mr. Hilton's class.

Presbyterian

With all good wishes,

Cordially yours,

Henry Chapman Swearingen

HCS:MD